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Sonja Dänzer\*

# Unfair Trade, Exploitation, and Below-Subsistence Wages

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**Keywords:** fair trade, exploitation, below-subsistence wages, fairness, coercion

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## Introduction

Many people seem to think of unfair trade in the supply chains of Multi-National Enterprises (MNEs) in terms of the “exploitation” of laborers in developing countries. According to this view, “trade is fair if it is based on activities which do not exploit the workers and the natural environment” (Boda 2001, 22). Boda takes it to be one of the prevalent positions on “fair trade” that it must avoid exploitation and argues, rightly in my view, that this view constitutes a common trait of diverse fair or alternative trade movements (Boda 2001).

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A prime case of exploitation in the supply chains of MNEs is often considered to be below-subsistence wages of workers in developing countries. While most companies oblige their suppliers to pay legal “minimum wages”, NGOs criticize that workers often cannot live decently on these, which forces them to work up to 18 hours a day to be able to feed their families.<sup>1</sup> Alternative trade movements and NGOs like the Clean Clothes Campaign (CCC) argue that this is exploitative and that workers should be paid “living wages” instead. The latter are defined roughly as wages which would allow workers to meet their and their families’ basic needs on 8 hours of work a day.<sup>2</sup> It is often assumed or argued that below-subsistence wages are exploitative (e.g. Levin-Waldman 2009; Yaqub 2013).

I take it that in the background of these claims, there is roughly the following implicit argument on the relation between below-subsistence wages, exploitation, and fair trade: (P1) the absence of exploitation is a necessary condition for “fair trade”, (P2) below-subsistence wages amount to exploitation, (C) the absence of below-subsistence wages (i.e. the payment of living wages) is a necessary condition for fair trade.

Now, while this might seem intuitively plausible, the conceptual and normative relations between below-subsistence wages, exploitation, and fair trade in economic exchanges claimed in these premises and the conclusion are not straightforward. And while P1 is not unproblematic at all (more on this in a minute) I will assume it to be true for the sake of the argument and focus my discussion in this paper on P2. The argument at the outset of this paper then is a conditional one: *Assuming* that P1 is correct, I try to show that (and how) P2 is correct, and therefore C follows.

My focus will be on premise 2 since I consider it an especially interesting question exactly how below-subsistence wages relate to exploitation, and what the concept of fairness has to do with it. The aim of this paper is to contribute to clarifying these relations. When exploring P2, I will focus on direct economic transactions between employers and employees (somewhere in the supply chains of MNEs), that is, on classical labor exploitation.

Before we start our discussion of P2, let us shortly consider P1. First, note that there is a conceptual connection between exploitation and unfair trade which makes P1 intuitively plausible: exploitation implies unfairness in exchange relations (see below), and direct exchange relations in the form of good-for-good or wage-for-labor exchanges are the most basic form of “trade”. So P1 is plausible for direct trading exchanges. However, P1 is not straightforward at all if we look at “trade” in a broader sense. Assuming that where

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<sup>1</sup> Cf. documents on <http://cleanclothes.org>.

<sup>2</sup> See Arnold 2003 for a minimalistic definition of a living wage provided by the United Nations.

goods are produced in sweatshops for below-subsistence wages the workers are being exploited and treated unfairly by their employers (P2) – how is this moral “stain” supposed to be passed on throughout the supply chain to the MNE and finally to the consumers? In other words, how is responsibility for unfairness supposed to spread along the chain of transactions, and how far does it reach?

This is a very complicated question that is hard to answer in a plausible way (I have struggled with it extensively elsewhere, cf. Dänzer 2013). Unless we try to argue that supply chains are a kind of cooperative venture that binds their contributors to each other in a common practice, which is hardly plausible, answering this question requires an analysis of the conditions under which MNEs or consumers have a moral responsibility for wrongs in the supply chains of their goods. The complications of apportioning moral responsibility for wrongs throughout something as complex as global supply chains is outside the scope of this paper. This means that my conclusions will not give us reason enough for claiming that MNEs or consumers are *themselves* engaging in unfair trade, or doing anything morally objectionable, when workers somewhere in their supply chains are not paid living wages (this is part of P1). However, in analyzing P2 we will gain valuable insights into the relation between exploitation, below-subsistence wages and unfairness, which is interesting and complicated enough in its own right.

## The central concepts: exploitation and fairness

Let us then take a closer look at the above argument. To make things easier we will reformulate it in its corresponding negative form:

- (P1) Exploitation in economic (labor) exchanges is a sufficient condition for engaging in unfair trade.
- (P2) Paying workers below-subsistence wages is a sufficient condition for exploiting them.
- (C) Paying workers below-subsistence wages is a sufficient condition for engaging in unfair trade.

A crucial concept in this argument is obviously “exploitation”, and we will therefore start our discussion with this concept and its role in the above argument.

Exploitation is a thick ethical concept that already *implies* that it is morally wrong. At the most general level, a widely accepted description of the moral wrong involved in exploitation is “unfair advantage taking of someone (or

something)”.<sup>3</sup> It accordingly requires an exploiter who exploits an exploitee or something in his relation with the exploitee. Since we are interested in labor exploitation in a (supposedly) free market, (P2) then reads: “Paying workers below-subsistence wages is a sufficient condition for taking unfair advantage of something (or them) in the respective free market transactions”. The question we need to explore then is what *unfair advantage taking in free market transactions* amounts to. Obviously, the concept of fairness itself is central for the argument.<sup>4</sup>

While most authors usually presuppose some implicit meaning of “fairness”, the concept requires explanation. While I have elaborated my understanding of fairness more extensively elsewhere (Dänzer 2013), I can only sketch the account here without arguing for it.

## Fairness

The concept of fairness we are interested in here is part of the realm of ethics generally (as opposed to political philosophy in particular). Fairness, as we understand and use it in common language, requires different behaviors in different contexts: no cheating in games and sports, no queue jumping, no favoring of some on grounds unrelated to the aim of the practice in the awarding of prizes or offices, no applying for social benefits if one has money enough, no coercion or deceit in the bargaining of contracts, and so forth.

In these examples as elsewhere, fairness seems to require resisting from particular kinds of *comparative disadvantaging*. What *kinds* of disadvantaging are forbidden by fairness in turn depends on the particular social practice at issue.

As my analysis has led me to think (Dänzer 2013), this aspect of fairness cannot be captured by understanding fairness in a purely abstract sense, for example in the sense of impartiality. Rather, the close relation of the requirements of fairness to their social context has to be integrated in an explication of the concept of fairness itself. In this sense, I take it that the demands of fairness can be explicated as the particular moral requirements that participants in a purposive social practice have toward their fellow

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<sup>3</sup> See for example Anderson 2006.

<sup>4</sup> The fact that “unfairness” figures in the basic explication of the concept of exploitation also makes clear why I consider (P1) to be rather plausible. Substituting the explication, (P1) reads “Unfair advantage taking in economic transactions is a sufficient condition for engaging in unfair trade”. If we understand “trade” in the sense of individual economic transactions, it only rests to argue that “unfair advantage taking” is a sufficient condition for “unfair(ness)”, which seems rather trivial.

participants in that practice (cf. Carr 2000). But fairness so understood has a universal moral dimension as well, in that it implies an assumption of basic equality among the participants in the practice. More precisely, fairness as I understand it has the following two dimensions: (a) an acknowledgement that people participating in purposive social practices owe it to each other to behave *in accordance with the (implicit) rationale or aim of the practice*; and at a more basic level (b) an acknowledgement of people's basic moral equality.<sup>5</sup> In this perspective, those kinds of advantage taking are unfair that go against the rationale or aim of the social practice in question and thereby, on some basic level, disrespect people's basic moral equality.

Assuming that my understanding of fairness is plausible, what does this mean for our question what unfair advantage taking of something (or someone) in free market transactions amounts to?

In free market transactions, the primary social practice at issue is the practice of bargaining (labor contracts in our context). The inherent rationale of the practice of bargaining is, rather uncontroversially I take it, to find terms of contract that the parties give valid consent to, or else to conclude that no such agreement is possible and the bargain is off. The issue of consent, which concerns the procedural dimension of transactions, is central because consent is morally transformative under certain conditions, that is, it makes things morally permissible that would not be permissible without the consent. These conditions are usually thought to be that the consent must be voluntary (or not coerced) and informed. This amounts basically to what is usually considered the procedural requirements of free market transactions.

It is important to note that the practice of bargaining so understood inherently implies that the parties can walk away from the bargaining if no agreement is found that they find acceptable. From the perspective of *factual* bargaining power, this explains why BATNA (best alternative to a negotiated agreement) is so important: the better BATNA someone has in comparison to the other bargaining parties the more bargaining power he has; the worse his BATNA is compared to the other parties' the smaller his bargaining power is.

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<sup>5</sup> Obviously this perspective requires substantive interpretation, because we need to identify on the one hand the kind of practice of relevance for a particular fairness concern, and on the other hand the rationale or "aim" of a particular practice. This need for interpretation is in my view not a reason to dismiss the account, but is inevitable due to the inherently social, interactional nature of the concept of fairness. For the necessary interpretation we use a morally informed "constructive interpretation" of the aims of the social practice in question (cf. e.g. James 2005, 33) and make as uncontroversial assumptions as possible.

Unfair advantage taking in the practice of bargaining amounts to taking advantage of something in a way that violates the procedural requirements of valid consent to an agreement. The “something” that is taken advantage of when a below-subsistence work contract is “bargained”, or so my thesis, is the other party not being able to walk away from the transaction because he has an extremely low BATNA, while the first party could do so easily because his BATNA is much better in comparison. While this is a supposition at this point, we will come back to it later with arguments in its favor.

## Exploitation and below-subsistence wages

Let me relate what has just been said to how the concept of exploitation is discussed. With regard to the exploitation, we can analytically distinguish between non-consensual exploitation, that is, exploitation to which the exploitee has *not* given his valid (morally transformative) consent, and consensual exploitation, to which he *has* given his consent (Wertheimer 2011, 201).

If below-subsistence wages are exploitative,<sup>6</sup> they would be a classic case of consensual exploitation: the employee agrees to the contract without being coerced to do so (i.e. nobody holds a gun to her head and threatens to kill her if she doesn’t sign, or something the like). Besides, the transaction is mutually beneficial, in that the potential employee benefits from the wage she is paid (even if it is not a living wage). And this is just the thing: what, one can ask, could be morally unacceptable about a transaction to which both consent voluntarily and that benefits both parties? Returning to our basic explication of exploitation we can frame the question as follows: what kind of *unfair advantage taking* might make a transaction like a work contract that implies a below-subsistence wage morally unacceptable *in spite* of being consensual (and beneficial)?

As I have indicated above, the problem from the perspective of fairness as I have presented it concerns the condition of the voluntariness of the consent, or rather the conditions of morally transformative consent.

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<sup>6</sup> Note that according to “ought implies can”, below-subsistence wages could not be considered exploitative if it simply would not be feasible for the employer to pay living wages. This proviso of course implies complications of its own that center on the question what “feasible” means in this context, which I cannot go into here though.

## Volenti non fit iniuria?

What is sometimes called the “volenti non fit iniuria”-argument (cf. Zuber 2010) holds that transactions in free markets are based on contracts which require the voluntary consent of both parties, and since voluntary consent is morally transformative, their outcome cannot be morally wrong or unfair. This argument is thus central for the question if and in what sense below-subsistence wages are to be seen as related to unfair advantage taking that amounts to exploitation.

There are two different versions of the “volenti non fit iniuria”-argument in the context of free market transactions: an economic-descriptive version and a normative version.

The economic-descriptive version of the “volenti non fit iniuria”-argument reiterates the understanding of voluntary beneficial transactions of economic theory: in economic theory preference orderings are derived from the choices people make. This means that we can see people’s preferences in their choices: if someone consents to a transaction this implies (descriptively) that she believes the transaction makes her better off (i.e. improves her preference satisfaction, utility, or welfare), since as a rational actor she would not consent to the transactions otherwise. Indeed, this connection of consent to welfare is thought to build normativity into “rational choices” and thus into what I called the economic-descriptive version of the “volenti non fit iniuria”-argument. However, as we will see later on the force of this welfare-based normativity of descriptive consent is weak by itself and can be overthrown by circumstances, since consent here only functions as evidence for the advantageousness of a transaction *compared to other possible options*.

The normative version of the “volenti non fit iniuria”-claim in the context of free market transactions by contrast focuses on the transformative moral force of consent: valid consent can make actions that would be morally prohibited become morally acceptable. This moral force can on the one hand be based on the right of every individual to decide over her private issues – in the words of Mill: “Over himself, over his own body and mind, the individual is sovereign” (Mill 2009, 32). Alternatively it can be based on the Kantian categorical imperative according to which one should never use a person as a mere means but always as an end in themselves. To request consent guarantees that we treat our exchange partners as autonomous persons and by this in Kant’s sense as an end in themselves (cf. e.g. O’Neill 1986, 44).

According to this understanding, as soon as there is valid consent to a transaction it is legitimate – whatever action it consists of and whatever consequences may result from it. This however is a very strong claim. *Just how*



strong it is depends on what counts as the *conditions* of valid consent. The main conditions are usually taken to be that consent is informed and voluntary. Calling into question the legitimizing force of consent to transactions where people consent to presumably exploitative work agreements accordingly amounts to arguing that one of the conditions was not met.

In the case of consent to below-subsistence work contracts, the actual voluntariness of people's consent might seem questionable. It seems that there are situations where people basically "have no other choice" but to accept a certain bad option – in our case a job offer for a below-subsistence wage. To claim that such consent is "voluntary" seems somehow to miss the point. If we have the intuition that there is something normatively wrong with such transactions *even if* the transaction partners give factual consent to the terms of the transactions, this might be because the consent is not "voluntary" in the relevant sense. Wertheimer mentions this in his discussion of coercion. He calls the idea that someone is effectively coerced into an option if he has no other reasonable alternative the "no-reasonable-alternative-view" (Wertheimer 2008, 390). He dismisses it quickly however, claiming that the fact that someone has no reasonable alternative alone does not make for a coerced decision, and concluding that "although this view has the ring of plausibility, it simply cannot be correct" (*ibid.*, 391).

Let us look at this issue in more detail though, because I take it that in a situation where someone consents to a bad option solely because has "has no other choice" under the circumstances, the normatively transformative force of his "voluntary consent" seems *indeed* called into question. The interesting question then is what the normative bases are for this intuition, and if they can stand up to scrutiny. Note that my focus in the following is not the correct use of the term "coercion" but the question when people's consent is normatively transformative and when it is not.

## Coercive threats, coercive circumstances, and coercive offers

To get a better understanding of this issue, let us first consider cases where the moral force of people's consent is undisputedly compromised: coercive human actions, and among them specifically coercive threats. By analyzing their structure and comparing it to the structure of the cases we are interested in we might gain important insights into the parallels and differences of the cases.

A classic case of a coercive threat is a robber telling his victim: "Your life or your money". Note that this statement literally seems to give the victim a choice:

he can either hand over his money or die. But this obviously does not make it appropriate to say that the victim hands over his wallet “voluntarily” or gives his “voluntary consent” to this action in normatively transformative sense. Rather, in cases like this we speak of people *being forced* to do something. But why is this?

The reason is that the victim chooses the option of handing over his money only because the alternative (death) is *completely unacceptable* in absolute terms. The robber threatens the victim that he will bring about this unacceptable consequence (losing his life) if the victim doesn’t do what he wants. He thereby reduces the victim’s options to only bad ones and coerces him to “consent” to the least bad one among them – which is the action that he wants to achieve.

Let us now compare the case of coercive threats like the above to what is sometimes called “coercive” circumstances. The perceived coercive effect of certain circumstances is similar to coercive human actions in that they both severely restrict the options available to someone, *leaving them with only bad options in absolute terms*. In this sense, we could translate the statement “I had no choice but to do x” to “under the circumstances, the alternative options to the one I chose were all so *bad or unacceptable in absolute terms* that I rationally had no choice but to choose the least evil option x” – which is analogous to the robbery example above. In this sense one could say that the people in question were somehow *coerced by the circumstances* to take the decision they took because their situation left them with no acceptable alternative options to the one they took for rational reasons. The recognition of this problem is not new – already Aristotle discussed it in his famous example of sailors who find themselves in a life-threatening storm and have to throw their cargo overboard to save themselves from drowning: “...for no one willingly throws cargo overboard, unconditionally, but anyone with any sense throws it overboard [under some conditions] to save himself and the others” (NE III, 2, 1110a 8f). Aristotle argues that this displays aspects of both voluntariness and involuntariness, but that it is closer to the voluntary (ibid.). However, in this passage it also shines through that “consent” to a bad option to avoid an ever worse one is actually merely an expression of rationality (“anyone with any sense”).

Similar to the storm in Aristotle’s example, severe poverty is a circumstance that drastically reduces people’s options to possibly only a few bad ones and might accordingly be understood as being coercive. One author who states this claim is Matt Zwolinski, when he writes: “Poverty can be regarded as coercive because it, too, reduces our options. Poverty reduces the options of many sweatshop workers, for instance, to a small list of poor options – prostitution, theft, sweatshop labor, or starvation” (Zwolinski 2007, 701).

There is of course an important difference between undisputedly coercive threats and “coercive” circumstances like the storm in Aristotle or severe poverty

in Zwolinski: while in the former case there is a moral subject who is responsible for reducing the victim's options to only bad ones, namely the "coercer", in the latter case there is (at least *prima facie*) no such moral subject. And since we usually use the term coercion in a way that implies an intentional "coercer" that carries the moral blame of the coercion, many think that it makes no sense to speak of "coercive" circumstances.

So let us look at a particular kind of situation which shows striking parallels to conditional threats while also including a responsible moral agent: conditional offers, like the one of a job for a below-subsistence wage.

Interestingly, the basic structure of conditional threats and conditional offers is very similar. This is illustrated by the following example: "*Your money or your life' might equally be proposed by a backalley robber or a pharmaceutical company; in one case it's a robbery, in the other case it may be a life-saving offer*" (Anderson 2006).

In the case of conditional threats, the structure looks as follows: A (the person making the conditional threat) attaches some undesirable consequences C to a certain action Q undertaken by B (*ibid.*): A claims that A will bring about consequences C if and only if B does Q. In the robbery example, A is the robber, B is the victim, C is the action of killing B, and Q is the action of not handing over his wallet. This "proposition has the same structure as an ordinary (conditional) offer by A to do something B desires if and only if B agrees to pay for it" (Zuber 2010, 45; cf. Anderson 2006): A claims that A will bring about consequences C (something B desires) if and only if B does Q (pays for it). For example, in Anderson's example of a conditional offer, the pharmaceutical company offers someone a cure from a disease that would otherwise kill him if and only if he pays for it.

However, there is usually seen to be a crucial difference between conditional threats and conditional offers: the fact that threats propose to make their recipients *worse off* than they would have been otherwise, while offers usually propose to make their recipients *better off* than they would have been otherwise (or at least not worse). And while coercion *restricts* the victim's options, offering to make someone better off *gives him an additional option*. In the words of Wertheimer, "*Whereas threats reduce the options available to the target, offers expand the options, and one does not coerce another when one's proposal expands rather than contracts the agent's options*" (Wertheimer 2008, 390). How indeed should giving someone an additional option be bad? This is of course exactly the conventional argument for legitimizing sweatshop labor. And in fact, it is not easy to refute.

There are basically two promising strategies for refuting the above claim. One is to argue that "making someone 'worse off'" should be understood not

with regard to the status quo before the transaction, but with regard to a normative baseline. The second is to argue that having to choose between only bad options undermines the normative force of consent to one of the options. Let us start with the first one.

As we said before, what is commonly thought to distinguish conditional offers from conditional threats is that the former propose to make the recipient better off, while the latter propose to make their recipients worse off. Now, making someone “worse off” can be understood as *harming* him, i.e. making him worse off than before the transaction (relative to a *descriptive* baseline), but it can also be understood in terms of the *violation of his rights*, *negative* or, importantly, *positive*, accordingly making him worse off compared to a *normative* baseline. Wertheimer operates with the latter understanding in his definition of coercion: “A coerces B to do X only if (1) A proposes or threatens to violate B’s rights or not fulfill an obligation to B if B chooses not to do X and (2) B has no reasonable alternative but to accept A’s proposal” (Wertheimer 2008, 390).

Zuber (2010) proposes to apply this to the question of coercive offers. She argues that the latter could be understood as offers (threats) of an option which would make B better off, but would fail to benefit B enough, compared to A’s obligation. If B has a right to be made better off according to a certain normative standard, not to fulfill this obligation then would be comparable to taking away an option B has a right to (cf. Zuber 2010, 47).<sup>7</sup>

I don’t see how this could be opposed given Wertheimer’s own definition of coercion. In fact, starting from Wertheimer’s definition of coercion we might extrapolate that, contrary to his quotation that relates the difference between offers and threats to expanding somebody’s set of options vs reducing it, what *actually* distinguishes coercive threats from offers (that can never be “coercive” according to Wertheimer) is something else: that in the case of coercive threats it is A’s perfect duty to fulfill B’s respective rights, whereas in the case of offers it is *not* A’s perfect duty to fulfill B’s respective rights.

In this sense, we could try to argue that in cases where companies offer potential workers below-subsistence wages, they are violating their obligation by violating the workers’ right – e.g. a right to subsistence or the right to earn a living wage. In Miller’s words, this position attempts to “define fair trade as trade that respects the human rights of both parties, where human rights are taken to include positive rights to subsistence and more generally to a minimally decent standard of living” (Miller 2010, 14). While this position is just as confronted with the problems of P1 as the one I am pursuing, with regard to P2 it is mainly confronted with the problem that it is unclear why it should be the *employer* – rather

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<sup>7</sup> For a similar reasoning see Sample (2003, 20f.).

than the state – that has the duty to fulfill the positive human rights of his employees. In the words of Kurjanska and Risse: “While it would be desirable if everybody had certain wages, trade relations do not trigger associative obligations to see to this” (Kurjanska and Risse 2008, 44). In the same vein, Wertheimer argues that if the worker’s right to subsistence is not fulfilled because he lives in a context with unjust background conditions, it doesn’t follow that the worker has a right that his *employer* ensure her subsistence (cf. Wertheimer 2011, 212).

I follow Wertheimer in this assessment since I find it difficult to directly justify the claim that it’s an employer’s perfect duty to ensure his employees’ subsistence. However, there is a second strategy for refuting the claim that offering someone an alternative option can never be morally wrong, which I consider to be more promising. Recall that we are not concerned with the term “coercion” itself but with the morally transformative force of consent to transactions. The second line of argument is based on the idea that having to choose between only bad options undermines the normative force of consent to one of the options. Accordingly, or so I will argue, offering such a transaction is unfair and exploitative.

## Having only bad options to choose from as undermining the normatively transformative force of consent

Feinberg, who was one of the few philosophers arguing in favor of the possibility of coercive offers – or, as I would call them, unfair or exploitative offers – argues that “coerciveness” can be present in offers “*in that they rearrange a person’s options in such a way that he has ‘no choice’ but to comply or else suffer an unacceptable consequence*” (Feinberg 1986, 230, cf. Zuber 2010, 46).

How is having “no choice” to be understood here? Feinberg gives his answer when he adds that “*Typically, [coercive offers] force a choice between evils*” (Feinberg 1986, 235), and that in this situation, the lesser evil becomes the only option because it is the exclusive alternative to an intolerable evil. In this situation, we could try to argue, consent to the offered (bad) option could be seen as insufficient for the outcome of the transaction to qualify as morally justified.

I consider this line of thought to be promising. Whether we call the *offers* as such “coercive” or not is not crucial – the point is rather that in such situations a person’s consent loses its normatively transformative force. Let me expand on this.

In a situation where someone has only bad option, the “consent” to this option is not of the normatively transformative kind, but of a purely *rational* kind: it is not his agreement with the option that makes him accept it, but his rationality. Formulated generally, if a person has the choice only between evils and chooses the least bad one among them, this is only proof of his *rationality* and not of his morally relevant *consent* to the option.

How can we formulate this in terms of conditions above the weak definition of voluntariness of economic theory that need to be met for consent to an option to count as normatively transformative? As we saw before, these conditions seem to concern the *options* a person has. With regard to these options, there are mainly two candidates: (p) the *quantity* of options available and (q) the *quality* of the options available. Formulated as conditions for voluntary consent, they could be spelled out (p) as having a certain minimum *number* of options from which to choose and (q) as having one or more *acceptable* options in absolute terms available.

I have indicated already that I consider the point to be the quality of options. Let us nevertheless shortly consider the possibility that the quantity of options matters for normatively transformative consent. First, note that clearly not every limitation of options by itself undermines the normative force of consent to an option. As a matter of fact, people’s options are limited in many ways in *all* decisions they take, but we would nevertheless consider consent to them normatively valid in many cases. As such, the options of a person in an industrialized country as to what job to take are limited by their education, their abilities, their place of residence, the demand on the job market, and so forth. Nevertheless, we would hardly consider someone’s decision for a certain job in this situation as non-voluntary in the sense of undermining the moral weight of their consent. Maybe then a certain *minimal* number of options is necessary for consent to a transaction to be voluntary in a morally relevant sense?

Comparing Zwolinski’s example with another one will serve to explore this possibility: consider Zwolinski’s case where person A has the options of prostitution, theft, sweatshop labor, or starvation (four options), and the case where person B has the options of either a well-paid job as a factory worker or an equally well-paid job as a vendor in a shop (two options). Surely B’s consent to one of his two options seems intuitively rather unproblematic, while A’s consent to one of his four options seems very problematic. Does this suggest that what is crucial for the normative weight of consent might not the quantity of the options but their *quality*?

Before exploring this option further, let me mention that there is a certain (rather trivial) *connection* between the quality and the quantity of options available to someone. Looking again at the example just mentioned, note that it just

*looks* as if the person had only two options. Of course, theoretically, he additionally *also* has a number of bad options similar to A – it is just that having good options he won't have to consider these options of last resort. In this sense, the overall number of options is always higher when it contains good options in addition to the options of last resort. This might account for our intuition that the number of options is relevant for the normal weight of consent in some way.

The relevance of the quality of other available options is that the criterion of the mutual advantageousness of a transaction concerns the quality of a given transaction *relative to no transaction at all*. If someone's BATNA implies e.g. starvation, then more or less *any* transaction is more advantageous than that and accordingly fulfills the economic criterion – even horrible ones in an absolute sense, including prostitution, selling one's child, or selling oneself into slavery. Considering such examples where the alternatives to a certain transaction are sufficiently bad shows that the criterion of mutual advantageousness is extremely weak – possibly so weak as to be morally completely irrelevant. Since the economic criterion of mutual advantageousness is intrinsically linked to the criterion of voluntary consent to a transaction – as we saw before, the assumption that a certain transaction is beneficial to both parties in terms of subjective preference satisfaction is *derived* from the assumption that the (rational) parties voluntarily consent to it – this matches the extremely weak moral relevance or even insignificance of the economic criterion of voluntary consent, which is then merely the freedom to make a rational decision.

Coming back to the relevance of the quality of options for the normative weight of consent, consider the case where a person C has the bad options mentioned by Zwolinski, prostitution, theft, sweatshop labor, or starvation, but *also* one option that is good in absolute terms, say, employment to good conditions. Now the consent of C to the one good option he has would usually intuitively be considered to be morally unproblematic. This is still the case where some person D has only two options – say, starvation or employment to good conditions. This suggests that having one or more *good* options in absolute terms available, might be a *sufficient* condition for morally legitimating voluntary consent, while the number of options is not crucial in itself. Tentatively we could say then that if a person has at least one option open to them that is acceptable in absolute terms, this is sufficient to make their consent to the respective transaction morally valid. Conversely, we could say that if a person has no option open to them which is acceptable in an absolute sense, this would make their consent to any of the unacceptable options morally invalid. Exchanges under these circumstances are called “exchanges born of desperation” (e.g. Walzer 1983, 120).

From what has been said in the last sections we can conclude that circumstances can be seen as undermining the moral relevance of consent to a certain

transaction in that they can be such as to make it rational to choose any morally horrible option. The main problem from a moral point of view then is the absolute moral badness of the options *per se*.

In this perspective, much hangs of course on the notion of a “bad” or “unacceptable option”. The question what is to be considered an unacceptable or bad option is clearly not easily answered. While I cannot pursue this in detail here, I will offer a few remarks on how this question could be treated.

To let the individual be the judge of that is not very promising, since there are certainly differing individual notions of what is an unacceptable option. So we need to think of bad or unacceptable options in absolute terms. This question is answered by moral theories. I take it that from the perspective of deontological moral theory, it could be argued that below-subsistence wages are insufficient for a live in dignity or fail to fulfill the basic human rights of people. From the position of Scanlon's contractualism (1998) it could be argued that if it were feasible for an employer to pay a living wage (low “costs”) but he chooses not to, the employee could reasonably<sup>8</sup> reject the arrangement based on the high “costs” that are imposed on him (e.g. he will not be able to have a minimally decent life in the sense of having his basic human interests or needs fulfilled), and below-living wages would thus count as morally unacceptable. If on the contrary it were not feasible for the employer to pay a living wage (“high costs”, e.g. because he would otherwise go bankrupt and have no jobs to offer anymore at all), Scanlon's test would suggest that offering below-subsistence wages can be justifiable. In any case, to define the acceptable minimum we would have to appeal to a first-order account of basic human interests or needs.

Note that at this point in this line of argument we need *not* show that the employer has the duty to fulfill the right to subsistence of his workers, but only that the option of a job at a below-subsistence wage is morally unacceptable in absolute terms (with certain exceptions, see above), which has consequences for the morally transformative force of consent to that option in a situation where all the other available options are unacceptable from an absolute standpoint as well.

To avoid any misunderstanding: I am not arguing that we should *prohibit* people whose life options are already highly restricted from taking a “bad option” in absolute terms that they consider the best they have under the circumstances (e.g. a job at a below-subsistence wage, prostitution, surrogate motherhood, etc.). Rather my line of argument aims at showing why and under which circumstances *offering* below-subsistence wages must be considered exploitative.

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<sup>8</sup> “Reasonable” in Scanlon's sense is not equivalent to “rational”, but is used in a moral sense: we are “unreasonable” if we ignore, or give too little weight to other people's moral claims (cf. e.g. Parfit 2003, 368).



## How below-subsistence wages are exploitative

Building on what has been said so far, the unfair advantage taking involved in exploitation lies in taking advantage of *circumstances or situations* that leave the potential exploitee without acceptable alternative options in absolute terms, to get him to consent to terms of contract that are unacceptable in absolute terms. This is *unfair* because it goes against the rationale of the practice of bargaining: to find terms of contract that are acceptable for the parties under the conditions of being voluntary and informed, or else to conclude that no such agreement is possible and the bargain is off, which, as we said, *inherently implies* that the parties can walk away from the bargaining if no agreement is found that they find acceptable. If one bargaining partner has a very bad BATNA in absolute terms while the other party does not, this option is off the table for the first party, thereby giving the second party all the power in the bargaining process. This compromises the rationale of bargaining: a “bargain” of the above sort is not a bargain anymore at all.

A “bargain” of the above kind also does not respect the fundamental moral equality of persons, which is the second aspect of the concept of fairness. What goes on in the market should never compromise the normative fact from the sphere of rights that people are equals. Walzer recognizes this as well when he writes:

(...) what goes on in the market should at least approximate an exchange between equals (a free exchange). These last words don't mean that every commodity will sell for a “just price” or that every worker will receive his “just reward”. Justice of that sort is alien to the market. But every exchange must be the result of a bargain, not of a command or an ultimatum. If the market is to work properly, “exchanges born of desperation” must be ruled out, for necessity, as Ben Franklin wrote, “never made a good bargain”. In a sense, the welfare state underwrites the sphere of money when it guarantees that men and women will never be forced to bargain without resources for the very means of life. (Walzer 1983, 120f)

What does this mean with regard to the situation of workers in developing countries where the state does not guarantee through a social safety net that the workers “will never be forced to bargain without resources for the very means of life” (Walzer 1983, 120f)?

Fairness requires treating a potential exchange partner in bargaining *as if* he had a viable other option, that is in our case an option to *at least* secure the resources for his survival, which would guarantee him sufficient bargaining power to make the negotiation a case of bargaining at all. In this counterfactual situation, he would *not* agree to any deal that left him with a below-subsistence

wage. In this sense, the minimum we have to offer if we want to treat our potential exchange partner as an equal is a living wage.<sup>9</sup>

In other words, we can argue that there is a duty on the part of B not to take advantage of the power the desperate situation of A gives him regarding the determination of the terms of the transaction. Fairness demands that B does not take advantage of this extreme power imbalance to strike a deal for maximum profit – although he could. Rather, it implies abstracting from the powerlessness of the transaction party and offering him a fair deal anyway – one that he could accept if he were not in a situation of desperate need: an acceptable offer in absolute terms.

This has some resemblance with Mayer's account of exploitation and of what is morally required instead: "Some initial disadvantage renders an agent exploitable. To calculate the just price in any given case, we simply imagine the same transaction without the initial disadvantage. The just price is thus the price which a non-disadvantaged party would accept or pay" (Mayer 2007, 145). The disadvantage in my account is someone having only bad alternative options in absolute terms to choose from.

My account is less ambitious than Mayer's in that it does not stipulate to explain what the "just price" is in a given transaction. It does, however, give us reason to think that below-subsistence wages, insofar as they represent unacceptable options in absolute terms, are to be considered exploitative.

## Conclusions

Let me resume the thoughts elaborated in this paper. I started out by reconstructing a popular argument stating that below-subsistence wages are a case of exploitation, exploitation is a sufficient condition for unfair trade, and thus below-subsistence wages are a sufficient condition for unfair trade understood as individual economic exchanges. The aim of the paper was to analyze if the presumed normative relation between below-subsistence wages and exploitation could be backed by argument.

My reflections led to the conclusion that this is indeed possible. I came to this conclusion through the following argumentative steps: since exploitation is commonly explicated as unfair advantage taking of some sort, I asked what this unfair advantage taking could consist in. For understanding what "unfair"

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<sup>9</sup> Unless that is, if we seriously *cannot afford* paying that wage, according to "ought implies can".

means in this context I presented my account of unfairness, which I explicate as taking advantage of something in a way that goes against the rationale of the social practice at issue and the fundamental equality of the participants. I then argued that with regard to our question the relevant social practice is the practice of bargaining and that the rationale of bargaining is finding an agreement that the parties can voluntarily consent to, or, if this is not possible, calling the bargain off. I asked the question how the requirement of voluntary consent might be violated in the case of below-subsistence wages and uttered the supposition that what was being taken advantage of is the extremely bad BATNA of a bargaining partner.

I explained that in the terminology of exploitation, below-subsistence wages are seemingly a case of consensual exploitation and presented the “*volenti no fit iniuria*”-argument, which holds that something that someone voluntarily consents to cannot be wrong.

I then searched for ways to attack this argument and argued that this can be done with regard to the understanding of the voluntariness-requirement. I compared the structure of coercive human action with the structure of potentially coercive offers and circumstances, concluding that they are all coercive in the sense of leaving the affected person with only bad options in absolute terms. In this situation I argued, a person’s decision for the least bad option is only a matter of rationality and not of normatively transformative consent. The *unfairness* of exploitation accordingly consists in violating the voluntary consent requirement, which is part of the rationale of the practice of bargaining, and compromises the moral desideratum that in an exchange (as in any other situation) people treat each other as equals. The *advantage taking* of exploitation concerns taking advantage of the circumstances to get through with an unacceptable offer in absolute terms. This requires specifying the criteria for an acceptable option in absolute terms, which is the job of moral theories. I concluded that insofar as below-subsistence wages are unacceptable options in absolute terms, they are to be considered exploitative.

According to my reasoning, “unfair trade” and beneficial exploitation in the sense of below-subsistence wages is related to the background conditions of economic transactions in that it depends on them not offering people acceptable alternative options, e.g. in the form of a functioning social security net. The establishing of such nets is accordingly a (long-term) measure against the problem of unfair trade in the specified sense. Another strategy that can be explained in terms of the above approach is strengthening the collective bargaining of workers, which shifts the bargaining power in favor of the workers by taking acceptable alternative options *away* from the employers, thereby

“forcing” them to offer acceptable terms of transaction that workers can give morally transformative consent to.

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